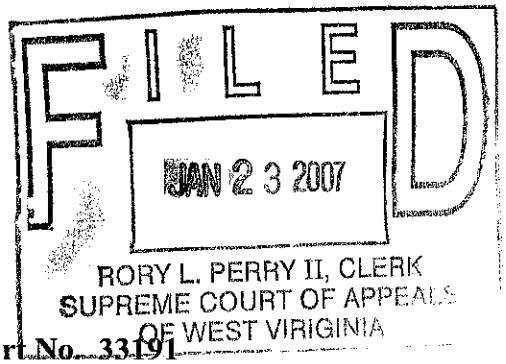
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

Supreme Court No. 33191
Circuit Court No. 04-F-3
(Kanawha)

WADE C. DAVIS,

Appellant.

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I.

THE STATE'S STATEMENT OF FACTS IS INACCURATE

The State paints an inaccurate picture of the facts. The State wants this Court to believe Wade Davis was looking for a fight, threw the first punch, retrieved a knife from his truck, and then "savagely" attacked Michael Lattea. State's Brief 5-6 The State's representations are simply untrue and this conclusion is supported by several witnesses at the trial. First, the State fails to mention that Chicago police expert Greg Johnson testified that he reviewed all of the evidence, including all witness statements and the Go-Mart videotapes, and in his opinion Wade was the one being attacked and acted in self-defense. (Tr. Vol. IV 88)

Secondly, Steve Kersey an independent eyewitness with an unobstructed view, indicated that Michael Lattea threw the first punch at Wade after Wade pulled the knife to defend himself against Michael, and the approaching Eddie Lattea, and Donald Shaffer. (Tr. Vol. III 206). Contrary to the State's representation, State's Brief 6, Wade did not return to his truck to retrieve the knife, he pulled it from his pocket. *See* testimony of Eddie Lattea, and Steve Kersey (Tr. Vol. II 53, Tr. Vol. III 206). Lt. Greg Young confirmed that if Wade had returned to his truck it would have been captured on the Go-Mart videotape. (Tr. Vol. III 65-66).

The State further asserts that the location of the knife wounds[1] on Michael Lattea

[1] The State represents that Michael suffered four stab wounds. This is not true. The medical examiner testified that there were four wounds on Michael's body, two in the chest area and two on the scalp. The medical examiner also explained three of the wounds were incise wounds or slash wounds, meaning that the depth is less than the length and only one wound was a stab wound. (Tr. Vol. III 126-129)

and the depth of the fatal wound on the left side of his chest were inconsistent with Wade's testimony that he swung the knife backwards at Michael to get Michael off of him after Michael jumped on top of him and started beating him. State's Brief 5 This is directly refuted by two things, the medical examiner's testimony and the courtroom demonstration by prosecutor. The medical examiner testified there were no defensive wounds on Michael, and further did not testify the wounds inflicted were inconsistent with Wade's testimony. (Tr. Vol III 88, 158) The prosecutor actually had Wade get off the witness stand and demonstrate the struggle between him and Michael, and even this failed to demonstrate any inconsistencies in Wade's testimony. (Tr. Vol. IV 70-72)

II.

TRIAL COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT'S INSTRUCTIONS DID NOT CONSTITUTE A KNOWING WAIVER. THEREFORE THIS COURT SHOULD REVIEW THE TRIAL COURTS INSTRUCTIONS FOR PLAIN ERROR (Rebuttal to State's Brief, pages 7-11)

The State's waiver argument is without merit. In *Miller* this court explained before waiver can be deemed to have occurred there must be proof that the waiver was an intentional relinquishment or abandonment of a known right. *State v. Miller, 194 W.Va. 3,18, 459 S. E.2d. 114, 129 (1995) (quoting United States v. Olano, 507 U. S. at 733, 113 S.Ct. at 1777, 123 L.Ed.2d. at 519).* Forfeiture occurs when there is a failure to make a timely assertion of a right. Forfeiture does not extinguish the error. *Id.*

It is true that trial counsel did not object to the Court's instructions at any point during the trial and specifically after the jurors asked the third question. However, counsel's initial failure to recognize the instruction was erroneous was obviously an oversight rather than an intentional, knowing waiver, particularly since counsel

subsequently pointed out the error at the hearing on the motion for new trial. *See United States v. Haddad, 462 F.3d 783,793 (7th Cir. 2006),* where the Court explained that while the government urges us to find defendant's response to the supplemental jury instruction as waiver, it seems to us that counsel's agreement with the supplemental instruction was oversight and therefore was accidental and not deliberate. Moreover, unlike what the State represents, State's Brief 11, counsel was not in agreement with what the Court proposed as a supplemental instruction to the third question from the jurors.[2] Although Counsel did not object, counsel did express concern to the Court that the jury was struggling with the element of intent but the Court had made up its mind as to how it was

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[2] The following conversation occurred prior to the Court responding to the jurors:

> Defense Counsel: I don't have a problem with that, but I think that the fact that they have asked with or without intent, there is, in the involuntary manslaughter section, that phrase that says that's the distinguishing feature.
>
> Prosecutor: They didn't ask about that.
>
> The Court: But they didn't ask about that.
>
> Defense Counsel: The last sentence I thought, said—
>
> The Court (Interposing): No. What it---And Maybe if you see the question, it would help. "Is second degree with malice and unlawful...."—and then underlined is ---<u>without intent</u> and voluntary manslaughter without malice and <u>with intent</u>..." -- Underlined – " . . . in the heat of passion. Please verify the with and without intent. "
>
> So I think what they want me to say, "Yes you've got this right," and rather than do that, I think I ought to just read the instructions to—
>
> Defense Counsel (interposing): Yes Sir
>
> The Court: -- the second and voluntary. Okay? Let's bring them back in. (Tr. vol. V at 24-25)

going to answer the question and failed to consider counsel's remarks. This was not an intentional relinquishment or abandonment of a known right by counsel as the State suggests.

Trial counsel again voiced his concern regarding the instructions and the trial court's supplemental instructions to the jurors at the hearing on counsel's motion for a new trial. At the hearing, counsel pointed out the error in the instructions and cited this Court's decision in *State v. Guthrie, 194 W.Va. 657,676, 461 S. E.2d 163,182 (1995),* in support of the contention that second degree murder is in fact an intentional crime and the trial court had failed to instruct the jury on this essential element, particularly when they specifically questioned the court on this point. (January 28, 2005, Hearing Transcript (1/28/05 Tr.)4, 13) " Clearly, the jury was hung-up on whether intent was there or not, and they went with the one that did not have intent." (1/28/05 Tr. 4)

Counsel, further argued, "[i]t is plain error, and if the instruction is incorrect, the Court, has the responsibility to set the verdict aside." (1/28/05 Tr. 4) Once again, the trial court failed to meet its responsibility and held the jury was properly instructed and the verdict would stand. (1/28/05 Tr. 13) The above actions of counsel demonstrate that forfeiture, not a waiver occurred. Therefore, this Court must determine if the instructional errors of the trial court amounted to plain error.

This Court should further consider that there is a current trend in many jurisdictions to look at the degree of the error before declaring that a waiver has occurred, essentially embracing this Court's holding in *State v. Dozier, 163 W.Va. 192, 255 S. E.2d 552 (1979),* that allowing a fundamental constitutional right such as due process to be waived would be a travesty of justice, clearly undermining the integrity of the fact-

finding process. In *State v. Laine 715 N.W.2d 425, 432 (2006)*, the Supreme Court of Minnesota held "[f]ailure to object to jury instruction generally results in waiver of the issue on appeal." (Citation omitted) "Even in the absence of objection at trial, however, we have discretion to review a claim of error on appeal if the jury instructions contain plain error affecting substantial rights or an error of fundamental law."

In *United States v. Vassar, 2006 WL 2524096(E.D. Tenn.)*, the court held "[t]he failure to request a jury instruction or to object to an instruction at trial results in a waiver of the issue and reversal is **required only in exceptional circumstances to avoid a miscarriage of justice."** (Emphasis added)[3]

The instructional errors in both *State v. Miller, 194 W. Va. 3, 459 S. E.2d 114 (1995)*, and *United States v. Lakich, 23 F.3d 1203 (7th Cir. 1994)*, on which the State relies to support its waiver argument, State's Brief 8-9, did not reach a constitutional level. In *Miller,* the argument advanced was that the court did not instruct on self defense. This Court held that it was not error on the part of the Court not to instruct on self defense and that defense counsel was not ineffective for failing to propose an instruction on self defense as it appeared to be trial strategy on the part of the attorney. *Miller, 194 W.Va. at 16, 19, 459 S.E.2d at 127, 130.* In *Lakich*, the court held that although the instructional error was waived by counsel's failure to object, the

[3] In *State v. Wamsley, 2006 WL 2876092 (Ohio App. 7th Dist.)*, the Court held "Generally speaking a failure to object to a trial error waives all but plain error on appeal. The failure to object to a jury instruction constitutes waiver of a claim of error thereto, unless, but for the error, the outcome of the trial clearly would have been otherwise. (Citation omitted)" *See also Guzman v. State, 857 N.E2d 28, (Ind. App. 2006)* (Failure to object to a jury instruction results in waiver on appeal unless giving the instruction was fundamental error.); *State v. Watkins, 2006 WL 3716910, 148 P3d 1112 (Wash. App. Div. 1)* (If a defendant fails to object at trial, an error may be raised for the first time on appeal if it "invades a fundamental right of the accused". (Citation omitted))

supplemental instruction as given by the court did not rise to the level of plain error. *Lakich, 23 F.3d at 1208.*

The instructional error in the case at bar is a constitutional violation and would constitute a miscarriage of justice if left uncorrected. Every criminal defendant is entitled to a fair trial and a jury properly instructed as to the law clearly falls within this right. The trial court's instruction for second degree murder confused the jury and thereby relieved the State of the burden of proving an intentional killing occurred beyond a reasonable doubt. Their confusion is evidenced by their third note to the trial court. The fact-finding process was flawed, and Wade Davis deserves a new trial.

The State's waiver argument also fails to acknowledge this Court's holdings in a line of cases that places the responsibility of properly instructing the jury on the trial court. *See State v. Riley, 151 W. Va. 364, 15, S. E.2d 308 (1966) overruled on other grounds, Proudfoot v. Davis Marine Service, Inc 210 WV 498, 558 S.E.2d 298 (2001).* (The ultimate responsibility in criminal cases to ensure the jury is properly instructed according to constitutional requirements must be placed with the trial court. When given instructions to the jury are the court's instructions.); *State v. Dozier, 163 W.Va. 192, 255 S. E.2d 552 (1979)* (irrespective of who requests them, the court must see to it that **all instructions** conform to constitutional requirements) (Emphasis added); *State v. Miller, 184 W. Va. 367, 400 S. E.2d 611 (1990),* ("The trial court must instruct the jury on all essential elements of the offenses charged, and failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error.") Significantly, the *Miller* Court stated that the failure to instruct the jury on the critical element of intent is reversible error. *Id. at 368, 400 S.E.2d*

at 612.

III.

THE TRIAL COURT'S INSTRUCTIONS WERE NOT ADEQUATE TO SUPPORT A CONVICTION OF SECOND DEGREE MURDER AS THE INSTRUCTIONS DID NOT REQUIRE THE JURY TO FIND INTENT TO KILL EXISTED (Rebuttal to State's Brief, pages 12-16)

The State agrees that intent to kill is an essential element of second degree murder. State's Brief 16. *See State v. Guthrie, 194 W.Va. 657,676, 461 S. E.2d 163,182 (1995)* (Per Justice Cleckley, "Any other ***intentional killing, by its spontaneous and nonreflective nature, is second degree murder.")*. (Emphasis added)

The State argues that because the trial court instructed the jury on malice, the element of intent to kill for second degree murder was satisfied. State's Brief 16. Relying on this Court's decisions in *State v. Hatfield, 169 W. Va. 191, 286 S. E.2d 402 (1982),* and *State v. Jenkins, 191 W. Va. 87, 443 S. E.2d 244 (1994),* the State asserts that intent to kill and malice are used interchangeably when dealing with second degree murder. While this may be true in some instances, the State is still under an obligation to prove that an intentional killing occurred and this did not happen in Wade's case.

The State is correct that the trial court's instructions must be viewed as a whole in determining whether they were correct. *See Syl. Pt. 4, State v. Guthrie, 194 W. Va. 657, 461 S. E.2d 163 (1995).* However, where, as here, the trial court's instructions at worst fail to include an instruction on intent to kill, at best are ambiguous, and subject to misinterpretation by the jury, the law must provide a remedy. The United States Supreme Court created a standard by which an individual instruction can be judged to determine if it is ambiguous and subject to improper interpretation by a jury in *Boyde v. California,*

494 U. S. 370, 110 S.Ct. 1190 (1990). In *Boyde,* the Supreme Court held when there is a claim that:

> "a challenged instruction is ambiguous and therefore subject to erroneous interpretation, the proper inquiry is whether there is a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence."

Id. at 380, 110 S.Ct. at 1198. In a different context, such as the one here, the question is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire, 502 U.S. 62, 72, 112 S.Ct. 475, 482 (1991) (quoting Boyde, 494 U.S. at 380, 110 S.Ct. 1198).*

In this case, there is no need for this Court to determine if there was a reasonable likelihood the jury applied the trial court's instruction in an unconstitutional manner. It is evident the jury did. The jury in Wade's case told the trial court that they interpreted the instruction for second degree murder in a way that relieved the State of its burden of proving an intentional killing occurred beyond a reasonable doubt when they asked:

> "Can you please verify the following : Is second degree with malice and unlawful and <u>without intent</u> and voluntary manslaughter without malice and <u>with intent</u> in the heat of passion? Please verify the with and without intent. Thanks"

(Tr. Vol. V 23) (Emphasis in original)

This note demonstrates that the jury was under the mistaken belief that second degree murder did not require intent to kill while the lesser included offense of voluntary manslaughter did require intent to kill. The jury did not understand malice to be a form of intent, otherwise they would not have asked "Is second degree with malice and unlawful and <u>without intent</u> ..." (Tr. Vol. V 23) This completely discredits the State's argument that because malice was included in the trial court's instruction the elements of second degree murder were satisfied. Before the State's argument would work, the State

would have to prove that the jury equated malice with intent to kill and it is clear from their note that they did not.

The trial court failed to correct this confusion. The trial court responded to the jury by re-reading the instructions for second degree murder, which did not include the element of intent, and voluntary manslaughter. It should also be noted that while the word malice was in the second degree murder instruction, the definition of malice and the trial court's explanation that malice is negated by sufficient provocation were not. Both of these explanatory instructions were in the instruction for first degree murder and were not read to the jury in response to their third note. The trial court allowed the jury to decide Wade Davis' fate under the mistaken belief that intent to kill was not an element of second degree murder, relieving the State of its obligation to prove an intentional killing occurred beyond a reasonable doubt and for this reason his conviction must be reversed.

"This Court has heretofore recognized that "malice" is not easy to define." *State v. Burgess, 205 W.Va. 87, 89, 516 S. E. 2d. 491, 493 (1999).* This Court has addressed the complicated and sometime confusing nature of malice on several occassions. *State v. Michael, 74 W.Va. 613, 620, 82 S.E. 611, 613 (1914), State v. Starkey, 161 W.Va. 517, 524, 244 S. E.2d 219, 223 (1978), overruled on other grounds, State v. Guthrie, 194 W.Va. 657, 461 S. E.2d 163 (1995), State v. Burgess, 205 W.Va. 87, 516 S.E.2d. 491 (1999).* One thing is clear, it is a concept that can be easily misunderstood by the jury, as occurred in this case.

All of the cases that the State cites in support of its contention that malice satisfies the element of intent to kill for second degree murder were situations in which this Court

held that an instruction, which allows the inference of malice and intent based on the defendant's use of a deadly weapon, was proper because the defendant failed to produce sufficient proof of provocation. State's Brief 16 In that type of situation it would be easy for a jury to understand that if a defendant used a deadly weapon without excuse or provocation that intent to kill was present. However, this Court has held that sufficient provocation or an imperfect self- defense negates malice. *See Syl. Pt 2, State v. Kirtley, 162 W. Va. 249, 252 S. E.2d 374 (1979), State v. Miller, 178 W.Va. 618, 622, 363 S. E.2d 504, 508 (1987).* Therefore, in a case like the present one, where sufficient provocation is present, an inference of malice and an intent to kill is not an easy connection for a jury to make, and rightly so. Accordingly, the blanket argument that intent to kill and malice are interchangeable as to second degree murder is simply inapplicable to this case.

Even if this Court were to hold that the trial court's initial instruction on second degree murder was sufficient, as the State argues, the trial court's supplemental instruction to the jury when they specifically questioned the court on intent to kill as it applied to second degree murder and voluntary manslaughter was not. The jury was confused and was seeking guidance from the court. Their note demonstrates that the jury believed that second degree murder did not require an intent to kill, while they believed that manslaughter, a lesser included offense, did require intent to kill. The trial Court failed to correct this mistaken belief when it had the opportunity and the jury ultimately decided Wade's fate believing that second degree murder did not require an intent to kill.

This demonstrates that the jury was misled by the court's instruction, and therefore the verdict cannot stand. As this Court stated in *State v. Guthrie, 194 W. Va. 657, 461 S. E.2d. 163 (1995*), "Jury instructions are reviewed by determining whether the

charge, reviewed as a whole, sufficiently instructed the jury **so they understood the issues involved and were not misled by the law."** (Emphasis added) For the above reasons, the second degree murder instruction as given by the court constituted plain error and as a result Wade was denied his fundamental right to a fair trial. The error in the instant case was not harmless and it cannot be said beyond a reasonable doubt that the instruction did not affect the outcome of the trial. Therefore, Wade Davis is entitled to a new trial.

RELIEF REQUESTED

For the foregoing reasons, Wade Davis respectfully requests that this Court reverse his conviction and remand his case to the Kanawha County Circuit Court for a new trial.

Respectfully submitted,
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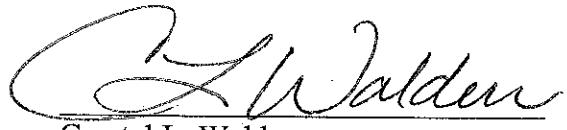
CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 23rd day of January, 2007, I sent via United States Postal Service a copy of the foregoing Appellant's Reply Brief to R. Christopher Smith, Assistant Attorney General, State Capitol Building 1, Room E-26, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305.



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